No. 06-562

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC RESEARCH CORPORATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

According to respondent (Br. 4, 28), "all" potentially responsible parties (PRPs) can sue other PRPs for cost recovery under Section 107(a)(1)-(4)(B) of CERCLA. As the government has explained, however, that interpretation is inconsistent with the text and structure of Section 107(a). It would also render Section 113(f) essentially superfluous, negating Congress's decision to create an express and carefully delimited contribution remedy for PRPs, and frustrating Congress's clear intent to provide powerful incentives to *encourage* PRPs to settle voluntarily with the government and perform government-supervised cleanups.

Apparently recognizing the unacceptable anomalies created by its interpretation, respondent urges the Court to eliminate some of those difficulties by the simple expedient of devising an altogether different scheme from the one enacted by Congress. Thus, notwithstanding the established principle that Section 107(a) imposes joint and several liability on PRPs, respondent urges the Court to dispense with that principle when PRPs bring suit, and instead to fashion remedies that would effectively transform such PRP suits into actions for contribution—albeit ones brought by litigants who do not qualify as contribution plaintiffs under *either* the traditional understanding of contribution *or* the express terms of Section 113(f). Faced with the unpleasant fact that its interpretation would demolish the carefully crafted settlement bar that Congress erected in Section 113(f)(2), respondent offers the further antidote that the courts should simply conjure up a new, broader settlement bar that would apply to Section 107 actions as well. All of this legislative tinkering might be a reasonable proposal to Congress, but it is too much to ask of this Court. In effect, respondent invites this Court to authorize the wholesale rewriting of the remedial scheme enacted by Congress so as to overturn the result in *Cooper Industries,*

Inc. v. *Aviall Services, Inc.*, 543 U.S. 157 (2004), which invoked a straightforward application of the statutory text. The Court should apply the normal rules of statutory construction and reject respondent's invitation.

A. Section 107(a)(1)-(4)(B) Does Not Permit Responsible Parties To Sue For Cost Recovery

1. Section 107(a)(1)-(4)(B) provides that all persons in four enumerated categories (*i.e.*, PRPs) shall be liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan" (NCP). 42 U.S.C. 9607(a)(1)-(4)(B). The better reading of the phrase "any other person" is that it excludes the "persons" previously referred to in the same statutory sentence, *i.e.*, the PRPs that are the sentence's subject. The various textual arguments of respondent and its amici to the contrary are unavailing.

Respondent primarily contends (Br. 7-8) that Section 107(a)(1)-(4)(B) should be read in parallel with Section 107(a)(1)-(4)(A), and that, under that reading, the phrase "any other person" in Section 107(a)(1)-(4)(B) necessarily excludes only the persons who are entitled to bring suit under Section 107(a)(1)-(4)(A): *i.e.*, "the United States Government or a State or an Indian tribe." Such a reading would be possible (although not compelled) if Section 107(a)(1)-(4)(A) and (B) provided alternative causes of action for the recovery of the *same* costs, as respondent contends (Br. 11). But in fact Section 107(a)(1)-(4)(A) and (B) provide for recovery of *mutually exclusive* costs. While Section 107(a)(1)-(4)(A) permits recovery of "all costs of removal or remedial action * * * not inconsistent with the national contingency plan," 42 U.S.C. 9607(a)(1)-(4)(A), Section 107(a)(1)-(4)(B) permits recovery only of "any *other* necessary costs * * * consistent with the national contingency plan": *i.e.*, costs *other than* the costs of governmental entities described in Section 107(a)(1)-(4)(A).

42 U.S.C. 9607(a)(1)-(4)(B) (emphasis added). Because the "other necessary costs" language already precludes governmental entities from suing under Section 107(a)(1)-(4)(B), respondent's reading would render the word "other" in the phrase "any other person" entirely superfluous—in contravention of the rule that every word in a statute should be given some operative effect.[1]

Respondent acknowledges (Br. 10-11) that, while a prior version of the language that would become Section 107(a)(1)-(4) authorized "any person" to bring suit for "any other costs" besides those incurred by a governmental entity, see S. 1480, 96th Cong. § 4(a) (as reported, Nov. 18, 1980), a substitute bill replaced the phrase "any person" with "any *other* person." See S. 1480, 96th Cong. § 107(a)(1)-(4)(B) (as amended, Nov. 21, 1980) (emphasis added). Respondent and its amici, however, offer no explanation for that change, other than to characterize it as a "minor stylistic change" or "mere drafting edit[]." Lockheed Br. 17. But words have meaning, and "any other person" plainly does not mean the same thing as "any person." Because the prior version of the bill, by limiting recovery to "other" costs, already unambiguously prevented governmental entities from recovering under Section 107(a)(1)-(4)(B), there was no need for Congress to "clarify" that governmental entities could not recover under that provision. And while respondent correctly notes (Br. 11) that there was no discussion of that change in the legislative history,

[1] Respondent notes (Br. 8) that, by permitting recovery of costs that are consistent with the NCP, rather than costs that are *not inconsistent* with the NCP, Section 107(a)(1)-(4)(B) has been read to place the burden on the *plaintiff* on the issue of consistency. That is true, but it does nothing to support respondent's view that "any *other* person" excludes only the governmental entities included in Section 107(a)(1)-(4)(A). Those entities could not have sued under Section 107(a)(1)-(4)(B) in any event—nor would they have any incentive to do so even if they could, given that it is more difficult to recover (and fewer costs are recoverable) under Section 107(a)(1)-(4)(B) than under Section 107(a)(1)-(4)(A).

that fact is neither dispositive, see, *e.g.*, *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 592 (1980), nor surprising, in light of the fact that the Senate passed the substitute bill on the Monday following the Friday on which it was introduced. See Pub. L. No. 96-510, 94 Stat. 2811. The history of Section 107(a)(1)-(4)(B) thus underscores that the inclusion of the word "other" was purposeful and confirms that the phrase "any other person" was intended to exclude PRPs, rather than (already excluded) governmental entities.

Contrary to respondent's contention (Br. 12), the "rule of the last antecedent" does not compel a different interpretation. As a preliminary matter, it is questionable whether that rule even applies here, because it provides only that an adjectival clause or phrase should be read to modify the noun that it immediately follows. See *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003). The adjective "other," by contrast, plainly modifies the noun that it precedes, "person," and the relevant question is thus not what the adjective "other" *modifies*, but instead to what it *refers* (and thereby excludes). Even assuming, however, that the rule could be relevant here, this Court has observed that the rule "is not an absolute and can assuredly be overcome by other indicia of meaning." *Ibid.* Here, in particular, the rule should not be read to trump the more fundamental rule against rendering statutory terms superfluous. Because the word "other" in the phrase "other necessary costs" already forecloses the possibility that the governmental entities enumerated in Section 107(a)(1)-(4)(A) could seek relief under Section 107(a)(1)-(4)(B), the *only* construction that gives meaning to the word "other" in the phrase "any other person" is one in which "other" refers to (and excludes) the PRPs listed earlier in Section 107(a)(1)-(4).

Respondent's amici contend that Section 107(a)(1)-(4)(B) should not be limited to suits by "innocent" private parties because the number of parties that would fall into that category would be "minuscule." See, *e.g.*, Consolidated Edison Br.

13. But even a modest role for a statutory provision is better than none at all (which is what respondent's view leaves the term "other"). Moreover, it is incontrovertible that Section 107(a)(1)-(4)(B) can be invoked by at least two important classes of private parties that would qualify as PRPs but for specific statutory exclusions: (1) parties that can show that the release of a hazardous substance was caused solely by the act or omission of a third party, see 42 U.S.C. 9601(35), 9607(b)(3); and (2) parties that can satisfy the statutory requirements for a "bona fide prospective purchaser," see 42 U.S.C. 9601(40), 9607(r)(1) (Supp. III 2003). Indeed, some of respondent's amici concede that they would usually be able to bring suit under the government's interpretation of Section 107(a)(1)-(4)(B). See ACWA Br. 16. When properly construed to permit only non-PRP private parties to bring suit, Section 107(a)(1)-(4)(B) thus has substantial operative effect.[2]

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[2] Respondent (Br. 5-6, 30) and its amici contend that the United States has taken conflicting positions concerning the availability of a cause of action for PRPs under Section 107(a)(1)-(4)(B). In reality, the United States has consistently maintained, in keeping with the unanimous view of the courts of appeals before this Court's decision in *Cooper Industries*, that Section 113(f) governs the procedures by which one PRP can sue another under CERCLA. See, *e.g.*, U.S. Br. at 21, *Cooper Industries*, *supra* (No. 02-1192) (stating that, "[w]hen read in combination, the clear implication of Section 107(a)(1)-(4)(B) and Section 113 is that the jointly liable party is limited to seeking contribution in the manner authorized by Section 113(f)"). In light of seemingly contrary suggestions in *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 818 & n.11 (1994), the United States did not specifically argue before this Court's decision in *Cooper Industries* that the plain text of Section 107(a)(1)-(4)(B) forecloses one PRP from bringing suit against another. Once *Cooper Industries* clarified that the suggestions in *Key Tronic* constituted dictum (see 543 U.S. at 170), however, the United States reexamined the statutory text and concluded that Section 107(a)(1)-(4)(B) does not confer a cause of action on PRPs. See, *e.g.*, U.S. Br. at 9-11, *Metropolitan Water Reclamation Dist.* v. *North Am. Galvanizing & Coatings, Inc.*, No. 05-3299, 2006 WL 1354188 (7th Cir. filed May 1, 2006).

2. All of the other arguments advanced by respondent and its amici in support of their construction of Section 107(a)(1)-(4)(B) also lack merit.

Respondent contends (Br. 20-21) that the phrase "any other person" in Section 107(a)(1)-(4)(B) should be construed as including PRPs because the same phrase appears, and is so construed, in Section 111(a). That provision specifies that the Hazardous Substances Superfund should be used for, *inter alia*, "[p]ayment of governmental response costs," 42 U.S.C. 9611(a)(1), and "[p]ayment of any other claim for necessary response costs incurred by *any other person*," subject to government authorization, 42 U.S.C. 9611(a)(2) (emphasis added). Section 111(a)(2), however, critically differs from Section 107(a)(1)-(4)(B) because the word "other" in the former provision must refer to the governmental entities that are implicitly mentioned in the previous paragraph; there is no other possible referent. The content of the term "other" obviously varies depending on the surrounding text and the universe of potential referents.[3]

Respondent relies (Br. 21-23) on regulations promulgated by EPA, but those regulations are consistent with the view that PRPs that cannot seek contribution under Section 113(f) have no remedy under Section 107(a)(1)-(4)(B). Indeed, the most relevant provision states that "[r]esponsible parties shall be liable for necessary costs of response actions * * * in-

[3] There is no incongruity in permitting PRPs to recover response costs from the Superfund while preventing them from bringing suit against other PRPs absent an underlying suit or settlement. Private parties can seek Superfund reimbursement only with respect to costs that have been "approved under [the NCP] and certified by the responsible Federal official," 42 U.S.C. 9611(a)(2), and the relevant regulation provides that the EPA may authorize a PRP's claim "only in accordance with an order issued pursuant to [S]ection 106 * * * or a settlement with the federal government in accordance with [S]ection 122." 40 C.F.R. 300.700(d)(5). Settling PRPs—including PRPs that enter into appropriate administrative consent orders with EPA under Section 106—would generally have the right to seek contribution under Section 113(f)(3)(B).

curred by any *other* person consistent with the NCP." 40 C.F.R. 300.700(c)(2) (emphasis added). The word "other" in the phrase "any other person" necessarily refers to (and thereby excludes) the "[r]esponsible parties" that are the subject of the sentence. While another provision, 40 C.F.R. 300.700(c)(3)(ii), states that a response action carried out in compliance with a Section 106 order or a Section 122 consent decree "will be considered 'consistent with the NCP'" for purposes of cost recovery under Section 107(a)(1)-(4)(B), it does not follow that PRPs that are ineligible for Section 113(f) relief can bring suit under Section 107(a)(1)-(4)(B). A private party can be subject to an administrative order under Section 106 even if it is not a PRP, see 42 U.S.C. 9606(b)(2)(C), and, in any event, to the extent that Section 107(a)(1)-(4)(B) imposes the underlying liability that is a necessary predicate for a contribution claim under Section 113(f),[4] the regulation simply makes clear that, when a PRP is entitled to obtain contribution for cost recovery pursuant to Section 113(f), it may recover any costs covered by that regulation without having to burden itself (and the courts) with the necessity of proving consistency with the NCP—often a costly, complex, and time-consuming matter that is best resolved through administrative expertise rather than the unnecessary expenditure of judicial resources.

Finally, respondent argues (Br. 26) that CERCLA was intended to "make those responsible for the contamination pay for the cleanups." It does not follow, however, that Con-

[4] Absent a discharge of liability by judgment or settlement with the government, PRPs *always* retain shared liability to the government for cleaning up (or paying for the cleanup) of their contaminated sites, regardless whether any private party has a cause of action under Section 107(a)(1)-(4)(B). See 42 U.S.C. 9606, 9607(a)(1)-(4)(A). Respondent thus errs in contending (Br. 2, 5-6) that PRPs have no CERCLA liability until another party has incurred response costs. Any PRP that has not discharged its liability to the government qualifies as a "person who is liable or potentially liable" under Section 106 or 107(a), and can therefore be sued under Section 113(f) by qualifying plaintiffs.

gress intended to permit any PRP to sue any other PRP for cost recovery at any time, even when the plaintiff has not yet resolved its own CERCLA liability. The government's reading of Section 107(a)(1)-(4)(B) fully effectuates CERCLA's purposes, and does so in an orderly fashion, by allowing government enforcement agencies to settle with (or take action against) PRPs before those PRPs can sue others for contribution, thereby encouraging settlements and supervised cleanups.

B. Respondent's Interpretation Cannot Account For Section 113(f), Which Provides The Exclusive Mechanisms By Which A Potentially Responsible Party Can Sue Another Under CERCLA

That *Cooper Industries* reserved the question in this case while construing Section 113(f) does not mean that Section 113(f) is irrelevant to the question here. To the contrary, that express statutory contribution provision fatally undermines the plausibility of respondent's proposed construction. Under respondent's reading, Section 113(f)'s interlocking remedial scheme for PRPs would be rendered largely superfluous, and Congress's goal of encouraging settlement with the government would be frustrated. The better view is that Section 113(f) provides the exclusive mechanisms by which one PRP can bring suit against another under CERCLA, and respondent's contrary arguments lack merit.

1. Respondent fails to come to grips with the established principle that, in the context of remedial statutes, "a precisely drawn, detailed statute pre-empts more general remedies." *Block* v. *North Dakota*, 461 U.S. 273, 285 (1983). It would have been peculiar if Congress, in enacting SARA, had supplied PRPs with an express cause of action for *contribution* (and explicitly addressed and resolved a variety of second-order issues such as the effect of settlement in those actions), but not a broader express cause of action for *cost recovery*, if

it intended to permit PRPs to pursue the latter (as well as the former) type of action.

Respondent repeatedly asserts (Br. 1, 16 n.8, 19, 23, 28, 29, 30, 43, 46) that lower courts have unanimously held that one PRP can bring suit against another for cost recovery under Section 107(a)(1)-(4)(B). Respondent thereby seemingly suggests that, because it was allegedly undisputed that one PRP could bring suit against another for cost recovery under Section 107(a)(1)-(4)(B) at the time Congress enacted SARA, Congress operated on that assumption, and left that right undisturbed, in providing an express cause of action only for *contribution* in Section 113(f). Respondent and its amici, however, utterly fail to identify the supposed plethora of cases in which lower courts held, *prior to Congress's enactment of SARA*, that one PRP could bring suit against another for cost recovery under Section 107(a)(1)-(4)(B). Instead, as previously noted (U.S. Br. 28), only a few district court cases had so held.[5]

On the other hand, at least one district court had concluded that a PRP did not have a right to cost recovery under Section 107(a)(1)-(4)(B). See *D'Imperio* v. *United States*, 575 F. Supp.

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[5] While respondent (Br. 10 nn.4 & 5) and its amici cite numerous cases, almost all of those cases are distinguishable on the grounds that (1) the case was decided *after* Congress enacted SARA in 1986 (and thus could not have informed Congress's understanding of Section 107(a)); (2) the court simply assumed, without analysis, that a PRP was entitled to bring suit under Section 107(a)(1)-(4)(B), see *Allied Towing Corp.* v. *Great Eastern Petroleum Corp.*, 642 F. Supp. 1339, 1348-1349 (E.D. Va. 1986); (3) it was unclear whether the plaintiff had first been sued or reached a settlement (and was therefore suing for contribution), see *Wickland Oil Terminals* v. *Asarco, Inc.*, 792 F.2d 887, 891 (9th Cir. 1986); (4) the plaintiff was or may have been an "innocent" party rather than a PRP, see *Walls* v. *Waste Res. Corp.*, 761 F.2d 311, 314 (6th Cir. 1985); *Artesian Water Co.* v. *Government of New Castle County*, 605 F. Supp. 1348, 1356-1357 (D. Del. 1985); *Jones* v. *Inmont*, 584 F. Supp. 1425, 1427 (S.D. Ohio 1984); or (5) the reference to PRP suits for cost recovery under Section 107(a)(1)-(4)(B) was mere dictum, see *United States* v. *New Castle County*, 642 F. Supp. 1258, 1262-1264 (D. Del. 1986).

248, 253 (D.N.J. 1983). Because it was far from settled that one PRP could sue another for cost recovery under Section 107(a)(1)-(4)(B) at the time Congress enacted SARA, the relevant question is not whether Congress impliedly repealed Section 107(a)(1)-(4)(B) by enacting Section 113(f). Instead, it is whether, when Section 107(a) and Section 113(f) are read together, the text of Section 113(f) suggests that a PRP is not entitled to bring suit under Section 107(a)(1)-(4)(B)—and the answer to that question is plainly yes. See *United States* v. *Estate of Romani*, 523 U.S. 517, 530 (1998); *United States* v. *Fausto*, 484 U.S. 439, 453 (1988).

The legislative history of SARA, moreover, supports the conclusion that Congress did not intend to permit a broader and amorphous implied cause of action for cost recovery to coexist with (and largely supplant) the narrow and carefully defined express cause of action for contribution that it supplied in SARA. Respondent does not so much as cite, much less explain, the report of the House Energy and Commerce Committee, which the United States emphasized in its opening brief (at 29). That report states that Section 113(f) "does not affect the right of the *United States* to maintain a cause of action for cost recovery under Section 107," without mentioning any corresponding "right" of private PRPs. H.R. Rep. No. 253, 99th Cong., 1st Sess. Pt. 1, at 79-80 (1985) (emphasis added). That legislative history indicates that, in enacting Section 113(f), Congress was operating on the assumption that a PRP could *not* pursue an action against another PRP for cost recovery under Section 107(a)(1)-(4)(B).

2. Respondent contends (Br. 4, 28) that "all" PRPs can sue other PRPs for cost recovery under Section 107(a)(1)-(4)(B). Under that view, of course, Section 113(f) is rendered entirely superfluous, because *any* PRP that paid response costs could sue directly under Section 107(a)(1)-(4)(B), regardless of whether it would qualify to bring a contribution action under Section 113(f). Respondent does not even attempt to justify

the absurd notion that Congress engaged in an entirely pointless and futile act in drafting Section 113(f) (and that this Court engaged in a similarly futile act in *Cooper Industries* in holding that the "during or following any civil action" limitation in Section 113(f)(1) means what it says).

At other points (*e.g.*, Br. 19), respondent seems to assume, as did the court of appeals (Pet. App. 17a), that only "voluntary remediators" could sue under Section 107(a)(1)-(4)(B), and that PRPs that made the mistake of settling with the government would be relegated to the contribution remedy provided by Section 113(f). Respondent does not, however, attempt to justify that atextual limitation on suits under Section 107(a)(1)-(4)(B), which is patently inconsistent with respondent's reading of the "any other person" phrase. For their part, respondent's amici concede that, in order to adopt that limitation, this Court would have to "create an implied exception in [Section 107(a)(1)-(4)(B)]." NRDC Br. 21 n.26.[6] Even if the Court were to engage in such radical statutory surgery, however, it would not cure the fundamental infirmity with the court of appeals' reading: *i.e.*, that a PRP could always circumvent Section 113(f)'s requirement of a pending or completed Section 106 or 107(a) action simply by bringing suit under Section 107(a)(1)-(4)(B).

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[6] In an effort to obviate the need to "create an implied exception," NRDC suggests that, at the time Congress enacted SARA, it was "at best ambiguous" whether Section 107(a)(1)-(4)(B) conferred a right to contribution, even though Section 107(a)(1)-(4)(B) "unambiguously provided * * * a right [to cost recovery] to those who engaged in voluntary cleanups." Br. 20. Because contribution is merely a form of cost recovery (and, indeed, the form with firmer common law roots), however, and because the purportedly sweeping preexisting cause of action for cost recovery would (if it had in fact existed) have obviated any need to supply the narrower contribution remedy enacted in Section 113(f), it could not have been clear before SARA's enactment that one PRP could bring suit against another under Section 107(a)(1)-(4)(B) for cost recovery, yet simultaneously unclear whether one PRP could bring suit against another under Section 107(a)(1)-(4)(B) for contribution.

3. Finally, respondent apparently concedes (Br. 48) that, at least to the extent that it is deemed a "voluntary" rather than "compelled" remediator, its claim does not qualify as a claim for "contribution" that could be saved by the savings clause in Section 113(f)(1). Respondent is correct to make that apparent concession, because the savings clause merely preserves the ability of a PRP to bring an action for contribution (as that concept is traditionally defined) under any other provision of law, including state law. See 42 U.S.C. 9613(f)(1). The savings clause does not purport to "save" any supposed cause of action for PRPs under Section 107(a)(1)-(4)(B), as it would have done if Congress had intended PRPs to have such a remedy.

C. Section 107(a) Does Not Create An Implied Right To Contribution Separate And Apart From The Explicit Contribution Remedy Set Forth In Section 113(f)

Respondent makes no serious effort to defend the court of appeals' alternative holding that Section 107(a) contains an implied right to contribution, distinct from the cause of action for cost recovery contained in Section 107(a)(1)-(4)(B). Pet. App. 15a. In particular, respondent offers no response to the argument that Section 107(a) is best read as not giving rise to an implied right to contribution at all. Nor does respondent refute the point that any implied right of contribution would, at most, authorize contribution in its traditional sense.

Instead, respondent contends (Br. 45) only that, "[i]n the event that [it] is somehow deemed a 'compelled remediator,'" it should be entitled to avail itself of an implied right to contribution. Even assuming that Section 107(a) contained an implied right to contribution, however, the relevant question would not be whether a PRP had incurred cleanup costs under some form of "compulsion"—or, as respondent alternatively suggests (Br. 48), whether the PRP's actions "result[ed] in a complete cleanup"—but rather whether the PRP had extin-

guished its common liability to a third party through suit or settlement. Respondent does not explain how it could qualify to seek contribution notwithstanding the fact that it has indisputably not been subject to suit (or reached a settlement) with regard to the costs it seeks to recover. As a result, respondent cannot avail itself of any implied right to contribution under Section 107(a).

D. The Structure And Purpose Of CERCLA And SARA Do Not Permit A Potentially Responsible Party To Sue Another Potentially Responsible Party To Recover Cleanup Costs

Respondent offers no valid response to the argument that its reading of Section 107(a)(1)-(4)(B) would undermine Congress's goals, in enacting CERCLA and SARA, of promoting government-supervised cleanups and encouraging PRPs promptly to settle with the government.

1. Respondent disputes the proposition (Br. 39) that, under its reading of Section 107(a)(1)-(4)(B), a PRP that has not yet been sued under Section 106 or 107(a) may have incentives not to settle with the government, in order to preserve its right to sue other PRPs under the substantially more generous provisions of Section 107(a)(1)-(4)(B) rather than Section 113(f). Respondent's arguments lack merit.

First, notwithstanding the settled principle that Section 107(a) imposes joint and several liability on PRPs (in keeping with its plain text, which makes PRPs liable for "*any*" qualifying response costs), respondent contends (Br. 7) that, when (but only when) a PRP is the plaintiff, Section 107(a) should instead "impose several liability only, just as in the contribution remedy provided by § 113(f)." Respondent offers no textual basis for that inconsistent treatment, which has seemingly been rejected even by courts that have adopted respondent's reading of Section 107(a)(1)-(4)(B). See Pet. App. 15a; *Consolidated Edison Co. of New York, Inc.* v. *UGI Utils.*,

Inc., 423 F.3d 90, 100 n.9 (2d Cir. 2005), petition for cert. pending, No. 05-1323 (filed Apr. 14, 2006). Under the approach favored by those courts, however, a PRP could sue another PRP for joint and several liability, thereby placing the burden on the defendant PRP to pursue (and prove) a counterclaim against the plaintiff PRP simply in order to avoid paying for the plaintiff PRP's share of the costs.

In any event, it is uncertain whether even respondent's approach would entirely eliminate the burden on defendant PRPs, because a defendant PRP might still be required to pursue third-party claims for contribution against other PRPs in order to avoid paying for *their* shares. By proposing an atextual limitation on a PRP suit for cost recovery under Section 107(a)(1)-(4)(B) comparable to the textual limitation that Congress did impose on a PRP suit for contribution under Section 113(f), respondent makes clear that it seeks nothing less than to circumvent Section 113(f)'s requirement of a pending or completed Section 106 or 107(a) action through the simple expedient of bringing an action under Section 107(a)(1)-(4)(B). Respondent cannot simply borrow the subsidiary aspects of Section 113(f) in order to make its Section 107(a) action workable without also borrowing the major limitation of Section 113(f), which makes clear that respondent has no viable action. Cf. *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 125 (2005) (rejecting attempt to "borrow" only statute of limitations, but not other limitations, of a specific statutory cause of action).

Second, respondent claims (Br. 31) that PRPs permitted to sue under Section 107(a)(1)-(4)(B) would not receive a potentially more favorable limitation period, because actions for "first instance response costs" are never subject to the three-year limitation period for actions for contribution in Section 113(g)(3), even when asserted by a contribution plaintiff. Respondent is mistaken. Contribution is available for "first instance" response costs, see 42 U.S.C. 9613(f)(3)(B); *United*

Techs. Corp. v. *Browning-Ferris Indus.*, 33 F.3d 96, 101-102 (1st Cir. 1994), cert. denied, 513 U.S. 1183 (1995), and Section 113(g)(3) provides that "[n]o action for contribution for *any response costs*" may be brought outside the three-year limitation period. 42 U.S.C. 9613(g)(3) (emphasis added). Thus, *all* contribution claims are subject to the three-year limitation period, whereas PRPs, if permitted to sue under Section 107(a)(1)-(4)(B), could avail themselves of the potentially more generous limitation period for cost-recovery claims.

Third, respondent suggests (Br. 38) that, when one PRP sues another for cost recovery under Section 107(a)(1)-(4)(B), a court could, "where appropriate," prohibit the plaintiff PRP from recovering where the defendant PRP had itself reached a settlement with the government. It is indisputable, however, that the settlement bar enacted by Congress in SARA provides protection only against actions for "contribution," not actions for cost recovery. 42 U.S.C. 9613(f)(2).[7] In proposing (Br. 38) that courts ignore the *expressio unius* principle and create out of thin air a parallel settlement bar that would miraculously extend to cost-recovery actions "precisely the same settlement protection" afforded to contribution actions by Section 113(f)(2), respondent once again seeks to borrow complementary parts of Section 113(f) while ignoring

[7] Amicus Lockheed contends (Br. 25-26) that, because the settlement bar in Section 113(f)(2) provides protection only against "claims for contribution *regarding matters addressed in the settlement*," 42 U.S.C. 9613(f)(2) (emphasis added), it protects only against claims by PRPs that have reimbursed some portion of the *government's* costs and not against claims by PRPs that incurred response costs of their own. As respondent seemingly recognizes (Br. 37), however, whether an action for cost recovery implicates "matters addressed in the settlement" turns on the terms of the settlement agreement itself, and courts have upheld settlement agreements that protect settling defendants from contribution claims for response actions being performed by other PRPs. See, *e.g.*, *United States* v. *BP Amoco Oil PLC*, 277 F.3d 1012, 1015, 1020-1021 (8th Cir.), cert. denied, 537 U.S. 942 (2002); *United States* v. *Davis*, 261 F.3d 1, 27-28 (1st Cir. 2001); *United States* v. *Southeastern Pa. Transp. Auth.*, 235 F.3d 817, 822-823 (3d Cir. 2000).

its major limitation. Statutory construction simply does not work that way. Respondent's effort merely confirms that allowing private PRPs to pursue actions against settling PRPs would create incentives not only for would-be plaintiff PRPs not to settle with the government (so as to preserve their right to sue settling PRPs), but also for would-be defendant PRPs not to settle (because a settling PRP could still be sued by another PRP).[8]

The Court should see respondent's proposed statutory rewrites for what they are: *viz.*, an effort to create a shadow contribution scheme under Section 107(a)(1)-(4)(B) for PRPs that cannot satisfy Section 113(f)'s suit-or-settlement requirement. "There is no reason why Congress would bother to specify conditions under which a person may bring a contribution claim, and at the same time allow [the precise equivalent of] contribution actions absent those conditions." *Cooper Industries*, 543 U.S. at 166.

2. Respondent and its amici suggest that, in enacting CERCLA and SARA, Congress intended to encourage voluntary cleanups of contaminated sites. That is undoubtedly true, but it does not follow that Congress intended to promote unsupervised cleanups *at the expense of* government-supervised cleanups pursuant to settlement or suit. Indeed, the legislative history on which they rely actually confirms that Congress sought to encourage voluntary cleanups pursuant to settlements with the government. Thus, respondent cites (Br. 26) Senator Domenici's statement concerning the importance of encouraging "voluntary cleanup actions," 131 Cong. Rec. 24,730 (1985), but omits the very next sentence, which makes clear that he was referring to voluntary *settlement agree-*

[8] As a theoretical matter, of course, settling PRPs remain subject to actions for cost recovery by "innocent" private parties under Section 107(a)(1)-(4)(B) and by non-settling sovereigns under Section 107(a)(1)-(4)(A). In practice, however, the prospect of such actions is likely to be a much smaller deterrent to settlement than the prospect of actions by other PRPs.

ments with the government. See *id.* at 24,731 (explaining that, "[u]nder [SARA], the President would be authorized to enter into agreements with potentially responsible parties to conduct remedial actions"). Similarly, amici Browner et al. cite (Br. 6) Representative Lent's reference to "a key groundbreaking structural reform [in SARA] that will encourage responsible parties to come forward and take responsibility for cleaning up the toxic waste sites they helped create," 131 Cong. Rec. 16,573 (1985), but omit the very next sentence, which makes clear that the "reform" at issue was designed to encourage *settlements* with the government. See *ibid.* (noting that, "[i]n this bill, we have provided the EPA administrator with additional authority to expedite settlements * * * so that responsible parties will no longer 'hide in the weeds' and avoid their responsibility to safeguard the public health and safety").

SARA was no doubt motivated by concerns that PRPs were resisting EPA's cleanup demands, necessitating costly and time-consuming litigation. But Congress addressed that concern by creating incentives for PRPs to enter into settlements with the government. There is no evidence in the legislative history of either CERCLA or SARA that suggests that Congress intended to allow PRPs to bring suit under Section 107(a) despite the very real danger that such suits would undermine the government-enforcement and settlement regime established by those statutes.

3. Private PRPs retain considerable incentives to engage in cleanups notwithstanding their inability to sue under Section 107(a). See U.S. Br. 43. And where a private PRP incurs substantial response costs and then enters into a settlement with the federal or state government (and where the PRP can identify other solvent PRPs with respect to the same facility), the PRP will generally be able to recover an allocated share of its costs by bringing an action for contribution under Section 113(f)(3)(B).

Respondent's amici suggest that, where EPA compels a PRP to undertake a response action by means of an administrative order under Section 106, the PRP would be unable to seek contribution from other PRPs, because the administrative order would not constitute a "civil action" for purposes of Section 113(f)(1). But a PRP threatened with issuance of a Section 106 order has two options, either of which may entitle it to seek contribution. If the PRP has no objection to the proposed response action, it can agree with EPA to enter into a consent order, and EPA has indicated that it will generally include language in such an order that would render it a "settlement" for purposes of Section 113(f)(3)(B).[9] On the other hand, if the PRP objects to the order, it can refuse to comply, whereupon the United States could bring suit under Section 106(b)(1) or Section 107(a)(1)-(4)(A) (and thereby trigger the right to seek contribution under Section 113(f)(1)).

Amicus Consolidated Edison also suggests (Br. 4-5) that, under the government's interpretation of Section 107(a)(1)-(4)(B), a PRP would have no incentive to settle with a State, because the State would somehow be disabled from entering into a qualifying settlement under Section 113(f)(3)(B). It is hard to see why that is so. While there are various open questions concerning precisely what a State must do in order to enter into a qualifying settlement, a State *could* do so by, at a minimum, making clear in the settlement that it was releasing its claim for response costs under CERCLA. Notably, the amici States do not embrace Consolidated Edison's view, but instead complain only that they would have to divert their attention from other cleanups upon receiving requests to enter into settlements at other sites. See States Br. 26-28. That

[9] See Memorandum from Susan E. Bromm, Director, Office of Site Remediation Enforcement, EPA, and Bruce S. Gelber, Chief, Environmental Enforcement Section, Environment and Natural Resources Division, Department of Justice at 2 (Aug. 3, 2005) <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-rev-aoc-mod-mem.pdf>.

concern is overstated, however, given that States can and do require parties to reimburse the administrative costs incurred by States in entering into settlements. Moreover, many States have established EPA-approved voluntary cleanup programs in which they commit to ensure that such cleanups will be conducted in accordance with federal law. See EPA, *Memoranda of Agreement (MOAs) on State Voluntary Cleanup Programs (VCPs)* (Dec. 22, 2006) <www.epa.gov/brownfields/html-doc/statemoa.htm>. There is no obvious reason why States could not enter into settlement agreements with private parties that satisfy the terms of those programs.

Wholly apart from any incentives to settle in order to trigger a federal contribution remedy, PRPs also have powerful incentives to settle with States because virtually all States can also pursue PRPs under state law (which often enables PRPs to obtain contribution from other PRPs as well). See, *e.g.*, Environmental Law Institute, *An Analysis of State Superfund Programs: 50 State Study* 7-9, 31-35, 53-57, 139-279 (1998) (listing state statutes) <www.elistore.org/reports_detail.asp?ID=436>; Ark. Code Ann. §§ 8-7-501 *et seq.* (2000). Thus, the government's interpretation of Section 107(a)(1)-(4)(B) leaves PRPs with considerable incentive and opportunity to enter into settlements with States, and to engage in cleanups more generally.

4. Finally, respondent renews the contention (Br. 26-27) that, when federal PRPs are subject to liability, EPA would forgo enforcement action (and thus insulate those PRPs from liability for contribution). Respondent, however, does not dispute the proposition that EPA has repeatedly taken enforcement action in those circumstances.[10] Respondent's

[10] Respondent's amici contend that the government broke off settlement negotiations in this case and in *E.I. du Pont de Nemours & Co.* v. *United States*, 460 F.3d 515 (3d Cir. 2006), petition for cert. pending, No. 06-726 (filed Nov. 21, 2006), in the wake of this Court's decision in *Cooper Industries*. But the plaintiff PRPs were not negotiating with EPA to resolve their own cleanup liability; rather, they were merely seeking monetary relief from federal PRPs.

amici unwittingly confirm that proposition when they cite statements by EPA officials indicating their commitment to ensuring that the government abides by its obligations under CERCLA. See Browner Br. 16-17. Although the United States does not bring actions against itself in federal court, it routinely exposes itself to liability by pursuing enforcement action against private PRPs, and can also be subjected to liability when state or tribal authorities or "innocent" private parties take action themselves against PRPs.

The government's waiver of sovereign immunity in Section 120(a)(1) likewise provides no support for respondent's position. That waiver merely imposes liability on federal PRPs "to the same extent" as private parties; it does not define the class of permissible plaintiffs under Section 107(a) (or, for that matter, any other provision of CERCLA). The argument that SARA's waiver of sovereign immunity justifies reading into Section 107(a) a broad right of cost recovery against governmental and private PRPs alike is thus a non sequitur. Like all of the other policy arguments advanced by respondent and its amici, it should be rejected with leave to renew it before Congress, to which it is more properly directed.

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For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

APRIL 2007

Any "refusal" by the government to settle on those terms was understandable in light of the fact that, in the government's view, the plaintiff PRPs have no cause of action absent resolution of their own liability.